REL: April 8, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2210060

Hannah C. Wood

v.

Daniel K. Gibson

Appeal from Winston Circuit Court
(DR-18-900083.01)

MOORE, Judge.

Hannah C. Wood ("the mother") appeals from a judgment of the Winston Circuit Court ("the trial court") insofar as it modifies the custody of her child, who was born on May 31, 2017, to award sole physical custody of the child to the child's father, Daniel K. Gibson ("the father"). We reverse the judgment.

Procedural History

The parties have previously been before this court. See Wood v. Gibson, [Ms. 2200064, May 28, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). In Wood, this court summarized the relevant procedural history as follows:

> "The parties were divorced by a judgment entered by the trial court on November 19, 2018; among other things, that judgment awarded the parties joint legal custody of the child and awarded the mother sole physical custody of the child, subject to the father's specified visitation, and ordered the father to pay child support in the amount of $523 per month. On April 1, 2019, the mother filed in the trial court a petition to terminate the father's visitation with the child or, in the alternative, to modify his visitation. On May 9, 2019, the father filed an answer and a counterclaim, requesting sole physical custody of the child, 'restricted visitation' between the mother and the child, and an award of child support. On July 25, 2019, the father amended his counterclaim to assert a contempt claim against the mother and to request pendente lite custody of the child, asserting that the mother had routinely refused to allow him to exercise his visitation with the child. The mother filed a reply to the amended counterclaim on July 27, 2019.
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> "After conducting a trial, the trial court entered an order on December 19, 2019, holding the mother in criminal contempt but not addressing the other aspects of the case. On January 21, 2020, the father submitted a proposed order to the trial court, which granted the father sole physical custody of the child subject to the mother's visitation as specified therein. On February 26, 2020, the trial court entered an

> order stating, in its entirety: 'Proposed order filed by [the father] is hereby GRANTED.' On June 18, 2020, the father filed a 'proposed amended order,' which incorporated the terms of the February 26, 2020, order and added a clause stating that '[t]he mother shall pay child support in accord with Rule 32 of the Alabama Rules of Judicial Administration' and noted that the mother 'shall reimburse the [father] for any child support received since the entry of the previous order in this case.' The trial court entered a judgment on June 24, 2020, adopting the proposed amended order.
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> "On July 13, 2020, the mother filed a motion to alter, amend, or vacate the June 24, 2020, judgment or, in the alternative, a motion for a new trial; she asserted, among other things, that the trial court lacked jurisdiction over the father's counterclaim based on his alleged failure to pay a filing fee when he filed his counterclaim and that the trial court erred in modifying custody of the child. The mother also filed on July 13, 2020, a motion requesting that the trial court amend the judgment to reflect specific findings of fact and conclusions of law. See Rule 52(a), Ala. R. Civ. P. The father filed a response to the mother's motion to alter, amend, or vacate on July 25, 2020. The mother filed a notice of appeal to this court on October 20, 2020."

___ So. 3d at ___. This court determined that, because the trial court's June 24, 2020, judgment failed to dispose of the issue of the amount of child support to be paid by the mother, the trial court's judgment was not final, and we dismissed the mother's appeal. Id. at ___.

Following the dismissal of the mother's appeal and the issuance of this court's certificate of judgment in Wood on June 16, 2021, the trial

court entered a judgment on September 28, 2021, that, among other things, awarded sole physical custody of the parties' child to the father, subject to specified visitation awarded to the mother, and ordered the mother to pay child support to the father in the amount of $200 per month beginning January 1, 2019. The mother was also ordered to reimburse the father for any support payments that he had remitted to her since the entry of the February 26, 2020, order that had modified custody. The mother timely filed her notice of appeal to this court on October 18, 2021. On November 16, 2021, this court granted the motion's motion to incorporate the record from the previous appeal into the record for this appeal.

On January 29, 2021, while the first appeal was pending, the mother filed a motion in the trial court requesting that the court approve her statement of the evidence and proceedings in accordance with Rule 10(d), Ala. R. App. P., asserting that a transcript of the December 19, 2019, trial was unavailable. She also asserted that her statement of the evidence had been served on the father and that there had been no response or objection received from the father. The trial court entered an

order on February 11, 2021, that, among other things, granted the mother's motion to adopt her statement of the evidence.

The Rule 10(d) statement of the evidence outlines the testimony presented by the mother, the father, and the child's therapist, Ali Weekly Tyra. According to the statement of the evidence, Tyra testified that the child is developmentally delayed; that the mother had sought appropriate care and services for the child; that the child had been making progress; that the child had tested positive for placement on the autism spectrum, although, Tyra said, further testing was needed to confirm that diagnosis; that creating routines with similar structure by the mother and the father would benefit the child; and that Tyra had been unable to make contact with the father despite her attempts to do so.

According to the statement of the evidence, the mother testified extensively regarding the parties' visitation exchanges, including asserting that the father and his girlfriend had made negative or disparaging remarks toward or about her, that the father had struck her hand while she was trying to retrieve the child on occasions, and that the father had insulted and berated her. The mother further testified that

the father had desired additional visitation periods with the child so that he could take the child to Disney World or to Mardi Gras and that he had expressed outrage at her refusals regarding those requests. The mother testified regarding the child's having bruises, biting himself, and pulling his own hair following visits with the father. She asserted that the father had threatened not to return the child following visitation and that she had asked the police to escort her to certain exchanges, which had upset the father and had also resulted in the child's becoming upset. The mother further asserted that, both during and after visits with the father, the child had bitten others and himself, had struggled sleeping, had screamed at himself for no reason, had kicked and screamed and thrashed on the floor, and had injured himself.

According to the statement of the evidence, the father testified that the mother had taken actions to alienate the child's affection for him, particularly referencing a message she had posted to the Facebook social-media platform wishing her husband a "Happy Father's Day" for being a good stepfather and her unilaterally terminating visits between the father and the child. The father further testified that the child had

been baptized without his knowledge or attendance, that the mother had been rude to his girlfriend during visitation exchanges, that the mother's residence was dangerous because of a septic-tank system, that there had been no inappropriate behaviors on his part during visitation exchanges, and that the mother had consumed alcohol while the child was in her custody. The statement of the evidence indicates that the mother presented evidence contradicting the father's testimony, with the exception of the father's admission that he had made several inappropriate statements in anger, an admission with which she agreed.

Analysis

The mother first argues on appeal that the trial court lacked jurisdiction over the father's counterclaim seeking sole physical custody of the child and his contempt claim against the mother because he failed to pay the requisite filing fees. In Hudson v. Hudson, 178 So. 3d 861, 869 (Ala. Civ. App. 2014), this court observed that "the failure to pay a filing fee does not divest the trial court of jurisdiction over a counterclaim." Like in Hudson, the mother in the present case did not move the trial court to stay the proceedings on the father's counterclaims until he paid

a filing fee. Rather, the mother first raised her assertion that the father had failed to pay a filing fee in her July 13, 2020, motion to alter, amend, or vacate the June 24, 2020, judgment that this court, in Wood, ultimately determined was a nonfinal judgment. In Landry v. Landry, 182 So. 3d 553, 555 (Ala. Civ. App. 2014), this court addressed an argument that the failure to pay a filing fee to support a counterclaim for contempt resulted in the lack of subject-matter jurisdiction over that counterclaim. This court observed that, in that case, the issue of the nonpayment of the filing fee had been raised for the first time in a postjudgment motion, and we concluded, in pertinent part:

> "[T]he failure to collect a filing fee for a counterclaim does not deprive a trial court of jurisdiction over the counterclaim. The trial court should have assured that the mother paid the filing fee, but the trial court did not lack subject-matter jurisdiction over the counterclaim solely because that fee had not been collected."

Id. at 556. Like in Landry, the mother first raised the issue of nonpayment of the filing fee in her July 13, 2020, motion. Like in Landry, we conclude that, although the trial court should have assured that the father paid the filing fee, the trial court did not lack jurisdiction over the counterclaim because the fee had not been collected.

The mother next argues on appeal that the father failed to meet the burden for a modification of custody outlined in Ex parte McLendon, 455 So. 2d 863, 866 (Ala. 1984). This court outlined the applicable standard of review regarding this issue in Walker v. Lanier, 180 So. 3d 39, 42 (Ala. Civ. App. 2015):

> "'When evidence in a child custody case has been presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing. See Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), wherein this Court, quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993), set out the well-established rule:
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> > "'"'Our standard of review is very limited in cases where the evidence is presented ore tenus. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, Payne v. Payne, 550 So. 2d 440 (Ala. Civ. App. 1989), and Vail v. Vail, 532 So. 2d 639 (Ala. Civ. App. 1988), and we will not reverse unless the evidence so fails to support the determination that it is plainly and

> palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow. Gamble v. Gamble, 562 So. 2d 1343 (Ala. Civ. App. 1990); Flowers v. Flowers, 479 So. 2d 1257 (Ala. Civ. App. 1985).'"

> "'It is also well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous.'

"Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996).

"The law is well settled that '[a] parent seeking to modify a custody judgment awarding primary physical custody to the other parent must meet the standard for modification of custody set forth in Ex parte McLendon[, 455 So. 2d 863 (Ala. 1984)].' Adams v. Adams, 21 So. 3d 1247, 1252 (Ala. Civ. App. 2009). The custody-modification standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), requires that

> "'the noncustodial parent seeking a change of custody must demonstrate (1) "that he or she is a fit custodian"; (2) "that material changes which affect the child's welfare have occurred"; and (3) "that the positive good brought about by the change in custody will more than offset the disruptive effect of uprooting the child." Kunkel v. Kunkel, 547 So. 2d 555, 560 (Ala. Civ. App. 1989) (citing, among other cases, Ex parte McLendon,

> 455 So. 2d 863, 865-66 (Ala. 1984) (setting forth three factors a noncustodial parent must demonstrate in order to modify custody)).'
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> "McCormick v. Ethridge, 15 So. 3d 524, 527 (Ala. Civ. App. 2008). It is not sufficient for a noncustodial parent seeking a modification of custody to show that he or she is a fit custodian. Id. The noncustodial parent must prove all three McLendon factors in order to warrant a modification of custody. Id."

In the present case, this court does not have the benefit of a transcript of the trial; instead, we must rely on the Rule 10(d) statement of the evidence approved by the trial court. In Abel v. Hadder, 404 So. 2d 64, 67 (Ala. Civ. App. 1981), this court stated, in pertinent part:

> "Where no record is made of the evidence taken at a trial and the trial court approves a statement of the evidence pursuant to [Ala. R. App. P., R]ule 10(d), we must accept that statement of the evidence as being true. Mobley v. Turner, 346 So. 2d 427 (Ala. 1977). Where the evidence is heard by the trial court, it is presumed that the trial court's findings of fact are correct, and we can only reverse a trial court's judgment when it is palpably wrong, is not supported by the evidence, or is manifestly unjust. Cotton States Mutual Insurance Co. v. Conner, 387 So. 2d 125 (Ala. 1980); 2A Ala. Digest, Appeal & Error Key 1010(2)."

Citing L.M.J. v. J.I.J., 850 So. 2d 358 (Ala. Civ. App. 1997), along with a number of other cases, the mother argues that "visitation disputes alone are not a basis for [a] change of custody." The mother's brief at 44.

In L.M.J., this court acknowledged that, although the judgment at issue did not indicate what standard the trial court had applied to the request for a modification of custody, the trial court had indicated at a hearing in that case its apparent belief that a change of custody would be an appropriate sanction for contempt. 850 So. 2d at 362. This court concluded that,

> "[i]n light of the trial court's failure to indicate in its judgment that it applied [the standard for a modification of custody outlined in Ex parte] McLendon, [455 So. 2d 863 (Ala. 1984),] the trial court's comments, and the finding of contempt contained in the judgment, it appears that the trial court changed custody to the father as a sanction for the mother's continued contempt of the visitation provisions of the divorce judgment and subsequent in-court agreements to permit visitation ...."

Id. Moreover, this court noted that, in that case, the record did not contain evidence sufficient to support the conclusion that a change of custody would materially promote the daughter's best interests. Id.

In the present case, there is no indication that the trial court, like the trial court in L.M.J., modified custody of the child solely as a sanction for contempt. However, we agree with the mother that, like in L.M.J., the record in the present case does not contain evidence sufficient to

compel the conclusion that a change of custody would materially promote the child's best interests.

In Vick v. Vick, 688 So. 2d 852, 856 (Ala. Civ. App. 1997), also cited by the mother, this court stated "that problems encountered in carrying out visitation, taken alone, are not sufficient to necessitate a change of custody." The father asserted in his counterclaim seeking a modification of custody that, in addition to interfering with or denying him visitation with the child, the mother had, among other things, been hostile toward him and had attempted to alienate him from the child. The father also asserted that he feared for the child's safety while in the mother's care.

"Parental alienation" involves "'[a] situation in which one parent has manipulated a child to fear or hate the other parent; a condition resulting from a parent's actions that are designed to poison a child's relationship with the other parent.'" T.N.S.R. v. N.P.W., 170 So. 3d 684, 687 (Ala. Civ. App. 2014) (quoting Black's Law Dictionary 1288 (10th ed. 2014) (defining "parental-alienation syndrome")). The statement of the evidence does not show that the child has a condition causing him to fear or hate the father or that the mother instilled such a condition in the

child, intentionally or otherwise, through her actions. The evidence indicating that the mother had wished her husband a "Happy Father's Day" for his role as the child's stepfather and that she had unilaterally terminated visitation between the father and the child following escalating tensions between the two at visitation exchanges does not, on its own, prove parental alienation as defined by Alabama law. Moreover, we cannot conclude that the evidence presented by the father indicating that the mother drank alcohol while the child was in her custody or that the mother's home had a septic-tank system, without any indication of how either of those circumstances affected the child, supports a finding that the child's safety was in jeopardy while in the mother's care.

> "The [Ex parte] McLendon[, 455 So. 2d 863 (Ala. 1984),] standard is designed 'to minimize disruptive changes of custody because this Court presumes that stability is inherently more beneficial to a child than disruption.' Ex parte Cleghorn, 993 So. 2d [462] at 468 [(Ala. 2008)]. When implementing the McLendon standard, a trial court should allow a transfer of custody 'only after a sifting inquiry to assure that the stability and other interests of the child ... have been properly considered.' Gallant v. Gallant, 184 So. 3d [387] at 399 [(Ala. Civ. App. 2014)]."

K.U. v. J.C., 196 So. 3d 265, 272 (Ala. Civ. App. 2015). "The noncustodial parent must show that his or her plan of care would improve the life of

the child." Id. at 277. In the present case, the statement of the evidence is devoid of any testimony or other evidence indicating that a change of the child's custody to the father would materially promote the child's best interests. Rather, the testimony of Tyra, the child's therapist, indicates that routines and structure would benefit the child, that the mother had sought appropriate care for the child, and that the father had not responded to Tyra's numerous attempts to contact him in order to share information about the child's condition and care.

The mother is correct that the father failed to present sufficient evidence in support of each of the McLendon factors, as required for a modification of custody. Because the trial court's modification of custody is not supported by sufficient evidence, its judgment is reversed insofar as it modified custody of the child, and the case is remanded for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur.